

**NATIONAL LABOR RELATIONS BOARD
REGION 27**

29th STREET ALF, LLC d/b/a	:	CASE NO: 27-RC-245022
MEADOWVIEW OF GREELEY	:	
	:	
Employer,	:	
	:	
and	:	EMPLOYER’S REQUEST FOR
	:	REVIEW
UNITED FOOD AND COMMERCIAL	:	
WORKERS INTERNATIONAL	:	
UNION, AFL-CIO LOCAL 7	:	
	:	
Petitioner.	:	
	:	

The Employer, 29th Street ALF, LLC d/b/a MeadowView of Greeley (“MeadowView” or “Employer”) submits this Request for Review under Sections 102.69 (c)(2) and 102.67 of the Board’s Rules and Regulations of the Regional Director’s May 20, 2020 Decision and Certification of Representative (the “Order”). MeadowView also requests, under Section 29 C.F.R. § 102.67(j), that the Board (1) expedite consideration of this request, and (2) enter an order staying the findings of the Regional Director, including the Certification of Representation, while the Board considers this Request for Review.

Pursuant to Section 102.67 of the Board’s Rules and Regulations, this Request for Review must be granted because the Regional Director erroneously found (1) that MeadowView’s former Maintenance Director was not a statutory supervisor, and (2) that the election results were not tainted by the conduct of two supervisory employees.

PROCEDURAL BACKGROUND

On July 17, 2019, United Food and Commercial Workers International Union, AFL-CIO Local 7 (“Union”), filed a petition with Region 27 of the NLRB, seeking recognition as the bargaining representative for certain MeadowView employees. (Board Exhibit 1(a)). Pursuant to

a Stipulated Election Agreement, a secret ballot election was scheduled for August 7, 2019. (Board Exhibit 1(a)) Following a determination on challenged ballots, the Revised Tally showed 17 votes for the Union, and 15 against, with 1 undetermined challenged ballot. (Board Exh. 1(b)).

On August 14, 2019, MeadowView filed two objections related to the election conduct of the Union. MeadowView currently raises only its first objection for the Board's review.¹ This objections asserts that the Union and certain individuals acting on its behalf, including former² Maintenance Director Robert Ramirez ("Ramirez") and former Life Enrichment Coordinator Koshya Wang-Murao ("Wang-Murao"), engaged in objectionable pro-Union supervisory conduct. This unlawful conduct tainted the showing of interest, interfered with the fair operation of the election process, and destroyed the necessary laboratory conditions of the election.

On February 6, 2020, a hearing was conducted and the parties were given an opportunity to present evidence regarding the election Objections. On March 30, 2020, Hearing Officer José R. Rojas issued a report recommending that the Employer's objections be overruled. (Hearing Officer's Report on Objections, "Report," at p. 1)

On April 13, 2020, MeadowView filed Exceptions to the Hearing Officer's Report. ("Exceptions"). The Exceptions disputed (1) the Hearing Officer's finding that Ramirez was not a statutory supervisor under Section 2(11) of the National Labor Relations Act (Report, pg. 14); and (2) the Hearing Officer's finding that the election results were not tainted by the pro-Union conduct of Ramirez and Wang-Murao. (Report, pg. 21).

¹ MeadowView also objected to excess compensation paid to Union witnesses and voters for a pre-election hearing that never occurred. MeadowView does not seek further review of the Regional Director's determination with regard to this objection.

² Both Ramirez and Wang-Murao voluntarily left their positions with MeadowView in the months following the conduct and election at issue.

SUMMARY OF RULINGS

On May 20, 2020, the Regional Director issued the Order currently at issue. The Regional Director adopted the Hearing Officer's recommendations. (Order p. 1). Specifically, the Regional Director deemed evidence of Ramirez's supervisory authority conclusory in nature and insufficient to establish supervisory authority under the Act. (Order p. 3)

The Regional Director next considered whether the pro-Union conduct of Ramirez and Wang-Murao had a coercive effect or was likely to impair an employee's choice in the election, and whether the conduct interfered with this freedom of choice to the extent that it materially affected the outcome of the election. (Order p. 7) The Regional Director found that (1) the nature and degree of authority exercised by these two supervisors, (2) the nature, extent and context of their misconduct, and (3) the material impact of the misconduct on the outcome of the election all weighed against a finding that Ramirez and Wang-Murao's misconduct interfered with employees' free choice. (Order p. 7-9) MeadowView seeks review of these findings as they are contrary to Board precedent, clearly erroneous on the record, and raise compelling policy issues.

REQUEST FOR EXTRAORDINARY RELIEF

A party requesting the Board's review may also move for certain forms of extraordinary relief set forth in 29 C.F.R. § 102.67(j). MeadowView submits this written request for the following forms of relief: (1) expedited consideration of its Request for Review, and (2) a stay of the Regional Director's Opinion, including the Certification of Representative contained therein. This relief will be granted upon a clear showing that it is necessary under the circumstances. In the present case, such relief is required in order to avoid unduly prejudicing MeadowView, and the voting unit, by certifying election results and requiring bargaining based on a campaign and election unlawfully tainted by repeated and serious supervisory misconduct.

ARGUMENTS AND EVIDENCE

A. Board Review is Required Under Section 102.67(d).

The grounds for Board review of a Regional Director's decision are set forth in 29 C.F.R. § 102.67(d). A request for review may be granted on one or more of the following grounds: (1) a substantial question of law or policy is raised due to the absence of, or a departure from, Board precedent; (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; (3) the conduct of any hearing or any ruling made in connection with the preceding has resulted in prejudicial error; and (4) there are compelling reasons for reconsideration of an important Board rule or policy. 29 C.F.R. § 102.67(d)(1) – (4). Three of the four grounds for review are present in this case.

First, the Regional Director departed from Board precedent to find that the supervisory misconduct at issue in this case does not require a new election. The Board recognizes that it is error “to require **an explicit threat or promise** in order to establish objectionable prounion supervisory misconduct.” *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). Rather, all that is required is a showing that the supervisory prounion conduct at issue interfered with the employees' freedom of choice so as to materially affect the election outcome. *Id.* That Regional Director failed to properly apply this precedent, and instead minimized every aspect of the prounion supervisory conduct at issue in this case in order to conclude that a new election is not warranted.

Second, the Regional Director erroneously analyzed the factual record in order to conclude that Ramirez is not a statutory supervisor under the Act. MeadowView presented evidence that Ramirez conducted employee trainings, onboarded new employees who then worked under his supervision, approved time off, assigned duties, managed work performance, provided discipline and coachings, and participated in performance reviews, hirings and terminations. (37:3-38:58;

45:15-46:125; 48:4-10; 68:11-14; 189:6-18; Employer Exh. 10; Employer Exh. 14). This evidence was uncontracted, as not one Union witness even alleged that Ramirez was not engaged in supervisory responsibilities. The Regional Director erred in finding that this factual record was nonetheless insufficient to establish Ramirez's supervisory status.

Finally, there are compelling policy reasons to reconsider the Board rule on the scope of supervisory conduct required before a new election is warranted. As noted above, the Board holds that explicit conduct is not required to warrant a new election. *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). The level of implicit coercion that may be permitted is an important policy question raised by this case. Without review this Opinion, a supervisor may (1) repeatedly attend Union organizing meetings, (2) encourage direct subordinates to attend meetings and go so far as to essentially escort those employees to the meetings, (3) vocalize frustrations against the employer at the meetings, (4) sign a card in front of voters at the meeting, and (5) refrain from ever disavowing the Union or revoking their support of the Union at any point prior to the election. Such a campaign of implicit endorsement is as damaging as any explicit endorsement, and review of the Regional Director's decision is required in order for the Board to consider this issue.

B. Maintenance Director Robert Ramirez Was a Supervisor Under the Act.

The Regional Director first departed from Board precedent in finding that Ramirez was not a supervisor under Section 2(11) of the Act. Section 2(11) defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In order to establish supervisory status, the moving party must show: 1) that the employee held authority to engage in any 1 of the 12 enumerated supervisory functions listed in Section 2(11); 2) that the exercise of the authority was not of a mere routine or clerical nature but required use of independent judgment; and 3) that the authority was held in the interest of the employer. *Oakwood Healthcare*, 348 NLRB 686, 687 (2006).

1. Maintenance Director Robert Ramirez Held Authority to Engage in Numerous Supervisory Functions.

The factual record established Ramirez's authority to engage in numerous supervisory functions. This included, for example, training every associate on the safety checklist and on the safety procedures in the building. (37:3-5; 48:4-10; Employer Exh. 14). Ramirez was also responsible for onboarding and training multiple housekeeping employees who then went on to work under his direct supervision. (45:15-46:125; Employer Exh. 14) Ramirez's training responsibilities also included conducting ongoing in-service trainings for the full population of associates employed at the community. (52:1-11; Employer Exh. 16) Ramirez was also, by his own admission, responsible for the employees he directly supervised; for example, by approving their time off, assigning their duties, managing their work within their shift, providing discipline and coaching, participating in performance reviews, participating in hiring new employees, and participating in terminations. (37:3-38:58; 68:11-14; 189:6-18; Employer Exh. 10).

Vice President of Human Resources Teresa Bengtson ("Bengtson") testified that the Maintenance Director position is a department head position responsible both for maintaining the entire facility, as well as supervising the housekeeping department, laundry employees, and

maintenance technicians. (36:4-9).³ MeadowView considers the Maintenance Director position part of the management team and “leaders in the building.” (53:3-7)

a. Ramirez’s Supervisory Authority Was Evidenced By His Disciplinary Discretion.

“To confer supervisory status based on the authority to discipline, ‘the exercise of disciplinary authority must lead to personnel action without the independent investigation or review of other management personnel.’” *Veolia Transportation Services, Inc.*, 363 NLRB No. 188, slip op. at 6 (2016). In this case, Ramirez completed and signed multiple disciplinary forms, directly evidencing his authority to issue discipline. (50:15-21; Employer Exh. 15) Bengtson confirmed that Ramirez retained complete discretion to issue each instance of discipline and explained that the Residence Director was included in the disciplinary meetings only so they were aware of the discipline issued by Ramirez. (50:1-9; Employer Exh. 15).

b. Ramirez’s Supervisory Authority Was Evidenced By His Ability to Assign Work.

Ramirez’s supervisory authority was further confirmed by his authority to assign work to the employees who reported directly to him. “The assignment of an employee to a certain department or to a certain shift or to certain significant overall tasks would generally qualify as ‘assign.’” *Oakwood Healthcare*, 348 NLRB 686, 689 (2006). The uncontested evidence confirmed that Ramirez was responsible for directly supervising the housekeeping department, laundry department, and maintenance technicians. (36:2-9, 184:22-25, Employer Exh. 9). Ramirez directly supervised housekeeping employees Susan Quintana (“Quintana”) and Jessica Andrews

³ Notably, not one Union witness testified that Ramirez did not engage in supervisory responsibilities. Indeed, after the weight of the early witnesses and exhibits so clearly confirmed Ramirez’s supervisory status, the Union did not even challenge his supervisory status through either direct or cross-examination any further with the remaining witnesses. The fact that the Union all but conceded Ramirez’s supervisory status supports a finding that the Regional Director’s conclusion to the contrary is clearly erroneous on the record.

(“Andrews”) during the relevant period of June to August 2019. (38:9-12). Ramirez’s supervision included not only scheduling, assigning duties, and directing the daily work of these employees, but also approving time off requests. (37:15 – 38:3, 186:13-20; 224:2-12). Indeed, Ramirez approved time off requests on no less than four separate occasions. (39:21 – 40:5, 186:17-20, Employer Exh. 11). The ability to approve or deny these requests remained entirely within Ramirez’s authority throughout this time. (40:16-18)

c. Ramirez’s Supervisory Authority Was Evidenced by His Authority to Evaluate Employee Performance.

Ramirez was also responsible for evaluating employee performance on an ongoing basis. MeadowView introduced, for example, 30-day and 60-day evaluations for housekeeping employee Angela Villarea (“Villarea”), evidencing Ramirez’s responsibility to both onboard new employees and conduct ongoing performance evaluations. (45:2-9; Employer Exh. 14) Personnel documents for housekeeper Quintana similarly identified Ramirez as the supervisor responsible for completing both onboarding and training, as well as ongoing performance evaluations. (47:8-21; Employer Exh. 14)

d. Ramirez’s Supervisory Authority Was Confirmed By the Secondary Indicia.

Non-statutory indicia can be used as background evidence on the question of supervisory status. *Training School at Vineland*, 332 NLRB 1412, fn. 3 (2000). A substantial difference in terms and conditions of employment, for example, may be considered as a background factor or secondary criterion militating in favor of finding supervisory status. *American Commercial Barge Line Co.*, 337 NLRB 1070, 1072 (2002). The evidence showed first that Ramirez was evaluated on criteria directly tied to supervisory abilities and significantly different than the criteria applied to hourly associates. (31:14-19, 188:21 – 189:5, Employer Exh. 7, Employer Exh. 17). The

performance evaluation of supervisors included categories such as leadership and management responsibilities, staffing and development, and managing teams. (67:8-12; 67:17-19). Additionally, the very title of the performance evaluation for supervisors is different. It is entitled “Annual Performance Appraisal – Leadership.” (67:13-7, Employer Exh. 17).⁴

The testimony and evidence confirmed other differences in Ramirez’s terms and conditions of employment, including birthday PTO, holiday pay, and an extension of the rollover process for PTO that is not available to hourly associates. (35:1-10). Further, Ramirez attended at least one or two out-of-state trainings on an annual basis, intended specifically to develop his skills as a leader and a supervisor. (53:8-15) This attendance at management meetings served as yet another secondary indicator establishing supervisory authority. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003).

MeadowView also introduced four offer letters issued to MeadowView job applicants. (41:6-17, Employer Exh. 12). All four offer letters identified Ramirez as the supervisor to whom each newly-hired employee would report. (41:6-17, Employer Exh. 12). Again, Bengtson repeatedly confirmed that the offer letters introduced by MeadowView were offered as one small sample⁵ of the full scope of offer letters identifying Ramirez as the relevant supervisor. (41:24-42:3; 42:24-43:4). Bengtson confirmed that Ramirez participated in the hiring process. (58:9-24)

Lastly, the Board gives some significance to the fact that employees looked on the individual in question as a supervisor. *Bama Co.*, 145 NLRB 1141, 1143 (1964). The evidence confirmed that Ramirez’s reports universally viewed him as a supervisor. Several witnesses identified the Maintenance Director as part of the management team, a department head, and a

⁴ Notably, Ramirez was evaluated by the same performance appraisal process administered to Wang-Murao, who has consistently and correctly been deemed a supervisor under Section 2(11) of the Act. (67:2-4)

⁵ Indeed, Bengtson estimated that the full universe contained approximately 40 documents identifying Ramirez as a supervisor for various personnel purposes. (57:2-6)

leader in the building. (53:3-7, Employer Exh. 2). Indeed, this characterization was confirmed by nearly every Union witness to take the stand. (285:16-19; 300:8-11) This perception was well-founded, as Ramirez occasionally served as the manager on duty for the entire MeadowView facility. (21:9-19) That MeadowView employees viewed Ramirez as a supervisor is further confirmed by that fact that at least one employee who reported to Ramirez throughout her employment also then submitted her resignation letter directly to Ramirez in his capacity as Maintenance Director. (43:10-19; Employer Exh. 13) MeadowView overwhelmingly established Ramirez's authority to engage in supervisory functions. The Regional Director's conclusion to the contrary must be reviewed as it is a departure from Board precedent and clearly in error in light of this factual record.

2. *Ramirez's Job Required the Exercise of Independent Judgment.*

Independent judgement is defined to be, at a minimum, the authority to act or effectively recommend action, free of the control of others and to form an opinion or evaluation by discerning and comparing data. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006). Independent judgement contrasts with actions that are of a merely routine or clerical nature. *Id.* Judgement is not independent if it is dictated or controlled by detailed instructions, such as company policies or rules, verbal instructions of a higher authority, or provisions of a collective bargaining agreement. *Id.*

In this case, the undisputed testimonial evidence proved that Ramirez was expected to use discretion and independent judgment in running his department. (22:16 – 23:1, 186:17-20, Employer Exh. 3, Employer Exh. 9). Several witnesses testified that Ramirez had authority to approve the time off requests for the staff members in his department at his sole discretion. (40:16-18, Employer Exh. 11). Several witnesses also testified that Ramirez was responsible for

performance evaluations (24:7-8, 169:6-7). Ramirez himself testified that he did his “own hiring.” (185:20-23). Ramirez elaborated that he, “would actually look for the application, . . . look through the application, . . . call and set up [the first] interview. . . . conduct the second interview with the resident director and then, kind of go from there.” (186:6-12). This uncontradicted evidence established Ramirez’s ongoing exercise of independent judgment in his role as a supervisor.

3. *Ramirez’s Authority Was Held in the Interest of MeadowView.*

Section 2(11) requires that the alleged supervisor exercise authority “in the interest of the employer.” Acts held within the scope of employment or on the authorized business of the employer are in the interest of the employer. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 578 (1994). The evidence undeniably established that Ramirez was responsible for the Maintenance Department functions (38:6-8, 184:14-21, Employer Exh. 10). Ramirez’s actions as a supervisor plainly demonstrated that Ramirez’s authority was held in the interest of MeadowView.

C. Ramirez’s and Wang-Murao’s Ongoing Pro-Union Supervisory Conduct Tainted the Election.

In *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004), the Board established a two-factor test for determining whether to set aside an election based upon supervisory pro-union conduct. These two factors are: 1) whether the supervisor’s pro-union conduct reasonably tended to coerce or interfere with the employees’ exercise of free choice in the election; and 2) whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. The Regional Director improperly applied this test, and Board precedent, to conclude that the supervisory conduct in this case was not sufficient to warrant setting aside the election.

1. Ramirez and Wang-Murao's Pro-Union Conduct Reasonably Coerced or Interfered with the Employee's Exercise of Free Choice in the Election.

The Board considers the nature and degree of supervisory authority possessed by those who engage in pro-union conduct, as well as the nature, extent, and context of the conduct in question. *Id.* The current evidence overwhelmingly established that Ramirez and Wang-Murao possessed substantial supervisory authority over those that reported to them, and that their ongoing pro-Union conduct influenced the employees they directly supervised.

a. Board Precedent Requires a Finding That The Nature and Degree of Ramirez's and Wang-Murao's Supervisory Authority Resulted in Unlawful Interference.

In *Harborside Healthcare, Inc.*, the Board found that the nature and degree of a supervisor's authority supported a finding that the supervisor's pro-union conduct reasonably tended to coerce or interfere with the employee's exercise of free choice in the election. See, 343 NLRB at 910. The Board noted that the supervisor at issue was the immediate supervisor of employees in the voting unit. *Id.* Moreover, the Board found the supervisor had the authority to initiate disciplinary action, direct employees, assign employees' schedules, give principal input on employee evaluations (which affected retention and pay raises), immediately suspend and send home employees, and recommend suspension and termination of employees. *Id.* The Board finally noted that the employees in the voting unit reasonably perceived the individual at issue to be a supervisor with substantial authority. *Id.* The Board precedent controls the current outcome, as all of these factors are also present in the current matter.

Ramirez and Wang-Murao had the full panoply of supervisory authority. Several witnesses testified that Ramirez and Wang-Murao, using independent judgment, had authority to initiate disciplinary action, direct employees, assign employees, and evaluate employees. (28:7-13, 37:6 – 38:5, 81:16 – 82:4, 169:6-11, Employer Exh. 5, Employer Exh. 10). The evidence specifically

demonstrated that Ramirez initiated disciplinary action by completing and signing the coaching forms of the employees he directly supervised. (50:15 – 51:4, 189:13-14, Employer Exh. 15). Similarly, Wang-Murao was the sole reviewer in evaluating the three employees she directly supervised, which affected their pay rates. (29:10-15, 77:8-9, 154:12-14, Employer Exh. 6). Moreover, both Ramirez and Wang-Murao had carte blanche authority to approve requests for personal time off, conduct trainings, and hold pre-shift meetings with their departments. (190:5-12).

In addition to their formal supervisory authority, the nature of Wang-Murao and Ramirez's supervisory relationships further confirmed their persuasive authority over the voting unit. Wang-Murao conceded that her small team had strong relationships with one another, relied heavily on teamwork within the department, generally respected her, and had a "close-knit" relationship. (78:22-79:18; 109:4-6) For his part, Ramirez acknowledged that he was the longest tenured employee in the entire MeadowView facility and described his relationships with both Quintana and Andrews as one of trust and respect. (183:19-21; 188:1-16) Indeed, as further evidence of these close relationships, Ramirez's brother is married to Quintana's daughter. (188:1-16) The Union was well aware of and capitalized on the influence specifically of Ramirez when, as both Ramirez and Andrews testified, the Union introduced him as a leader among this close-knit workforce at a Union meeting. (193:17-194:8; 236:2-8). Ramirez himself identified his influence and leadership among the workforce as the very reason he attended the meeting. (193:19-20) Board precedent recognizes that this level of formal and informal supervisory authority greatly increases the impact of pro-Union conduct, and the Regional Director's failure to take this precedent into account must be reviewed.

b. The Nature, Extent, and Context of Ramirez's and Wang-Murao's Pro-Union Conduct.

The full scope of Ramirez's and Wang-Murao's conduct further confirmed its improper influence on the election. In *Harborside Healthcare, Inc.*, the Board recognized that some objectionable conduct may involve the more subtle question of whether a pro-union supervisor's conduct amounted to implicit threats or coercion. 343 NLRB at 909. Given the nature and degree of authority that some supervisors have over their subordinates, an employee may feel an implied threat or pressure to sign a card or otherwise support the union, even without an express threat or promise. *Id.* "A supervisor's statements may be coercive regardless of his friendship with an employee and regardless of whether the remark was well intended." *Washington Fruit and Produce Co.*, 343 NLRB No. 125 slip op. at 2 fn. 9 (2004).

In *SNE Enterprises*, 348 NLRB 1041 (2006), for example, the Board held that lead employees' solicitation of cards was coercive conduct. The Board found that, in the months prior to the election, the leads solicited the authorization cards of subordinates over whom they had the authority to responsibly direct and assign work. *Id.* at 1042. The Board noted that the leads were first-line supervisors and assigned and directed the work of the unit employees on a daily basis. *Id.* at 1043. The Board further noted the leads had the authority to issue written warnings. *Id.* As such, the Board concluded the elections should be set aside because the leads' solicitation of authorization cards was coercive. This Board precedent is controlling in the current case, and the same outcome is required.

As in *SNE Enterprises*, both Ramirez and Wang-Murao were front-line supervisors who specifically directed their pro-union activities toward the very employees they directly supervised. It is undisputed that Ramirez was the immediate supervisor of both Andrews and Quintana. (185:1-9). It is also undisputed that Wang-Murao was the immediate supervisor of employee-

voters Robbie Nuanez (“Nuanez”), Connie Oswald (“Oswald”), and Rebecca Lara (“Lara”). (77:3-7). Both Ramirez and Wang-Murao testified they attended two union organizing meetings and signed union authorization cards. (82:22 – 83:3, 192:21 – 193:14). Even though Wang-Murao could not recall whether she signed her card in front of other employees (99:2-15, Union Exh. 5), she did admit that she shared her frustrations by speaking up at the meeting. (92:8-25). Moreover, Wang-Murao conceded that the members of her team knew she signed an authorization card. (102:8-10) Ramirez readily acknowledged that he signed an authorization card at a Union meeting in front of around 25 people, each of whom he had personally come to know over his near decade of employment with MeadowView. (198:15 – 199:7, 202:5-25, Union Exh. 5). Wang-Murao also confirmed her recollection that Ramirez signed his authorization card at one of the union meetings. (105:17-19)

Further, Ramirez and Wang-Murao did not just attend multiple union organizing meetings, sign authorization cards, and voice their frustrations during the meetings, but they also actively encouraged their subordinates to attend. Oswald testified, for example, (1) that she “got along quite well” with Wang-Murao, trusted and liked her, (2) that Wang-Murao’s comments about the Union resonated with her, (3) that Wang-Murao encouraged her to attend a Union meeting, and that (4) because of Wang-Murao’s comments, Oswald ultimately decided to attend a Union meeting. (157:19-158:8). Though Wang-Murao knew Oswald was not initially interested in the Union, Oswald testified that Wang-Murao “said there was a lot of good information, . . . [and that Oswald] might want to go to find out some more information.” (158:21-24) Oswald identifies this very conversation as the point where she changed her mind and decided to attend a meeting after all. (158:24-159:3) Oswald summarized that Wang-Murao’s and Ramirez’s presence at the meetings led her to start thinking “well, maybe – maybe there’s some point to this.” (162:7-9)

Oswald further admitted that she signed a union authorization card, in large part, because she knew Wang-Murao had also signed a card. (T181:9-11) It cannot be seriously maintained that Wang-Murao and Ramirez's conduct had no similar influence on innumerable other employees in the voting unit.

Indeed, Ramirez admitted that (1) before he attended a Union meeting, he told both his subordinates that he was open to the idea of the union, (2) the subordinates trusted Ramirez to attend the meeting on their behalf and report back his thoughts on the issue, and (3) that the subordinates trusted Ramirez's opinion and were willing to follow his lead. (205:5 – 206:7, Employer Exh. 18). Both of Ramirez's subordinates both went on to then attend the Union organizing meetings because they felt more comfortable with Ramirez there. (197:10-16). During the meeting, Ramirez was introduced as a leader among the MeadowView employees, emphasizing the very authority that made Ramirez's participation improper. (193:15 – 194:16). Ramirez testified that his conduct at the meeting carried persuasive weight. (208:3-7, Employer Exh. 18). Ramirez also testified that, after the meeting, he had conversations with both of his subordinates about what he witnessed at the meeting. (207:11-14, Employer Exh. 18). The Regional Director improperly minimized the full scope of the misconduct at issue, and important policy considerations require review of this decision.

2. *Ramirez's and Wang-Murao's Pro-Union Conduct Materially Affected the Outcome of the Election.*

In determining whether pro-union conduct materially affected the outcome of the election, the Board relies on the following factors: 1) the margin of victory in the election, 2) whether the conduct at issue was widespread or isolated, 3) the timing of the conduct, 4) the extent to which the conduct became known, and 5) the lingering effect of the conduct. *Harborside*, 343 NLRB at 909.

a. The Exceptionally Close Margin of Victory Supports a Finding that Pro-Union Conduct Materially Affected the Election Outcome.

The revised tally of ballots in the election shows 17 votes for and 15 against the Union, with 1 undetermined challenged ballot. (Board Exh. 1(b)). In assessing the margin of victory, the Board will assume the unopened, uncounted challenged ballot was cast in favor of the objecting party. See, e.g., *Acme Bus Corp.*, 316 NLRB 274 (1995). Here, assuming the one undetermined challenged ballot was cast against the Union, this case presents the narrowest possible margin of victory: one vote.

In this case, Ramirez's implicit coercive and influential pro-Union conduct directly affected at least two employees who were directly under his supervision. (185:1-9). Wang-Murao's implicit coercive and influential pro-union conduct directly affected at least three employees who directly reported to her. (25:6-12; 76:17 – 77:2; 154:8-11). Indeed, Oswald's testimony alone establishes the influence over a single voter that could have altered the outcome of the entire election. As such, the coercive pro-Union conduct of Ramirez and Wang-Murao undoubtedly affected a critical number of employees relative to the Union's miniscule margin of victory.

b. The Widespread Nature of the Conduct Supports a Finding of Material Impact.

The impact of Ramirez's and Wang-Murao's coercive and influential pro-Union conduct was not isolated to the five individuals they directly supervised. A large part of the influential pro-Union conduct occurred in front of no less than 15-25 voters. (100:6-13, 201:21-23, Union Exh. 1). It was widely known among the MeadowView community that both Ramirez and Wang-Murao signed authorization cards. (202:5-10, 209:1-7). The impact of this conduct cannot realistically be limited to Ramirez's or Wang-Murao's direct reports.

c. The Lingering Effects of the Conduct Supports a Finding of Material Impact.

The lingering effects of the supervisory pro-Union conduct committed by Ramirez and Wang-Murao continued up to the very date of the election. Neither Ramirez nor Wang-Murao took any steps to make it known that they were no longer advocating support for the Union. To the contrary, Ramirez withdrew and simply ceased all communication with any and everybody. (200:23 – 201:6). Wang-Murao also never openly disavowed the Union, or openly stated that she was not interested in the Union. (110:14-18). Wang-Murao testified that, as a result of her decision to cease communication, all her team saw was her attendance and participation at multiple Union meetings. (102:5-10) The only position Ramirez and Wang-Murao ever took on the subject was one of Union support, as evidenced by their card signing, attendance at Union meetings, and conversations with their direct reports. This position was never corrected and, as a result, lingered through the very date of the election.

d. MeadowView's Inability to Disavow the Conduct Supports a Finding of Material Impact.

MeadowView's communication to employees during the Union's campaign could not have disavowed Ramirez's and Wang-Murao's pro-Union conduct, because MeadowView had no knowledge of the pro-Union conduct at that time. In assessing whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, the Board may consider the antiunion statements of higher company officials, and the extent to which they disavow coercive pro-Union conduct of supervisors. *Harborside*, 343 NLRB at 910 fn. 12. "[The] higher management's antiunion stance can mitigate a supervisor's pro-union conduct under certain circumstances if management takes timely and effective steps to disavow the conduct of pro-union supervisors." *SNE Enterprises*, 348 NLRB at 1043.

In *SNE Enterprises*, the Board held that a supervisor's pro-Union conduct warranted a new election, even though the Employer provided antiunion communication and literature throughout the campaign. *Id.* The Board noted that an Employer's public position on unions does not mitigate the effects of the supervisor's conduct where the Employer never addressed, much less, disavowed, the supervisor's specific, coercive conduct. *Id.*

Similarly, the current record contains no evidence that MeadowView specifically disavowed Ramirez's and Wang-Murao's pro-Union support prior to the election. Indeed, MeadowView could not possibly have addressed Ramirez's and Wang-Murao's conduct, as no MeadowView managers, supervisors, or leaders were aware of the conduct until the election was over and the damage was done. (100:19 – 101:2). Review of the Regional Director's decision is required due to this failure to properly apply Board Precedent.

CONCLUSION

Review is required as the Regional Director's Opinion is not supported by the factual record, fails to properly apply Board precedent, and presents an important policy issue for reconsideration. Based on the foregoing reasons, the Board should grant MeadowView's request for review. Further, the Board should grant MeadowView's request for extraordinary relief by (1) expediting consideration of this Request for Review, and (2) entering an order staying the Regional Director's Opinion, including the certification of election results contained therein.

Dated: June 3, 2020

Respectfully submitted,
29TH STREET ALF, LLC D/B/A
MEADOWVIEW OF GREELEY
Respondent

By: /s/Chad P. Richter
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CERTIFICATE OF SERVICE

I, Chad P. Richter, certify that on June 3, 2020, I caused the *Employer's Request for Review to the National Labor Relations Board* in the above-captioned matter to be filed electronically.

The undersigned also hereby certifies that on June 3, 2020, a true and correct copy of the above and foregoing document was served on United Food and Commercial Workers Union, Local 7, Attorneys Todd J. McNamara and Samantha L. Palladino, via electronic mail at tjm@18thavelaw.com, tmcnamara@ufcw7.com, and spalladino@ufcw7.com, and Regional Director of Region 27 of the National Labor Relations Board Paula Sawyer at paula.sawyer@nrlb.gov.

/s/Chad P. Richter
Chad P. Richter